Kopitiam Asia Pacific Sdn Bhd v Modern Outlook Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCVC-1738–10 OF 2017
MOHD FIRUZ J
30 AUGUST 2018

Civil Procedure — Discovery — Pre-action — Plaintiff claimed it was defamed by article circulating on websites and intended to sue those responsible for posting it ('intended parties') — Plaintiff sought court order requiring defendants as administrators of the websites to disclose owners of websites and thereafter for those owners to disclose identities of the intended parties so that intended action could be filed — Whether plaintiff fulfilled all requirements under O 24 r 7A of the Rules of Court 2012 — Whether granting of orders would avoid unnecessary litigation and save costs time and resources

The plaintiff discovered that an article allegedly defaming it was circulating on certain websites ('the offending websites'). The plaintiff wanted to sue for slander of goods but could not commence any action as it had no particulars of those responsible for posting the defamatory article ('the intended parties'). The plaintiff contended that the defendants were administrators of the offending websites and therefore would know who owned the offending websites and if those owners could be identified then the plaintiff could obtain from them the particulars of the intended parties. The plaintiff filed the instant application for pre-action discovery under O 24 r 7A of the Rules of Court 2012 ('the ROC') for an order that the defendants disclose all relevant information on the identities of the website owners and, thereafter, that the identified website owners disclose the necessary particulars of the intended parties.. The first and third defendants opposed the application, inter alia, on the ground that the information/documents sought by the plaintiff were too wide and vague and breached the Data Protection Act 2010.

Held, allowing the application:

(1) The plaintiff had fulfilled the requirements set out under O 24 r 7A and r 8 of the ROC. The orders sought for were necessary to allow the plaintiff to decide whether it could commence an action against the intended parties. The granting of the orders would lead to saving of costs (see paras 31–33 & 36–37).

(2) The plaintiff's application was not too wide, vague or akin to a fishing expedition as contended by the third defendant. As to the applicability of s 8 of the Data Protection Act 2010, s 39 of the same empowered the

courts to make orders directing persons in possession of relevant data to disclose it to a third party (see paras 33 & 35).

[Bahasa Malaysia summary

Plaintif mendapati bahawa satu artikel yang dikatakan memfitnah ia tersebar di laman web tertentu ('laman web yang menghina'). Plaintif mahu menyaman untuk *slander* barang-barang tetapi tidak dapat memulakan tindakan kerana ia tidak mempunyai butiran yang bertanggungjawab untuk menyiarkan artikel fitnah ('pihak yang dimaksudkan'). Plaintif berpendapat bahawa defendan adalah pentadbir laman web yang menghina dan oleh itu akan mengetahui siapa yang memiliki laman web yang dimaksudkan dan jika pemiliknya dapat dikenalpasti maka plaintif dapat memperoleh daripada mereka butir-butir pihak yang dimaksudkan. Plaintif memfailkan permohonan ini untuk penemuan pra-tindakan di bawah A 24 k 7A Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk perintah bahawa defendan mendedahkan semua maklumat yang berkaitan mengenai identiti pemilik laman web dan, selepas itu, bahawa pemilik laman web yang dikenal pasti mendedahkan butir-butir yang perlu bagi pihak yang dimaksudkan. Defendan pertama dan ketiga menentang permohonan tersebut, antara lain, atas alasan bahawa maklumat/dokumen yang dimohon oleh plaintif terlalu luas dan kabur dan melanggar Akta Perlindungan Data 2010.

Diputuskan, membenarkan permohonan:

(1) Plaintif telah memenuhi syarat yang ditetapkan di bawah A 24 k 7A dan k 8 KKM. Perintah yang dipohon adalah perlu untuk membenarkan plaintif memutuskan sama ada ia boleh memulakan tindakan terhadap pihak yang dimaksudkan. Pemberian perintah akan membawa kepada penjimatan kos (lihat perenggan 31–33 & 36–37).

(2) Permohonan plaintif adalah tidak terlalu luas, kabur atau serupa dengan ekspedisi memancing sebagaimana yang dikemukakan oleh defendan ketiga. Mengenai penggunaan s 8 Akta Perlindungan Data 2010, s 39 yang sama memberi kuasa kepada mahkamah untuk membuat arahan mengarahkan orang yang memiliki data yang relevan untuk mendedahkannya kepada pihak ketiga (lihat perenggan 33 & 35).]

Notes

For cases on pre-action, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3507–3513.

Cases referred to

Ching Mun Fong v Standard Chartered Bank [2012] SGHC 5; [2012] 2 SLR 22, HC (refd)

Faber Merlin Malaysia Bhd v Ban Guan Sdn Bhd [1981] 1 MLJ 105, FC (refd)

Infoline Sdn Bhd (sued as trustee of Tee Keong Family Trust) v Benjamin Lim Keong Hoe [2017] 6 MLJ 363, CA (refd)
Kuah Kok Kim & Ors v Ernst & Young (a firm) [1997] 1 SLR 169; [1996] 3 SLR (R) 485, CA (refd)
Norwich Pharmacal Co and others v Commissioners of Customs and Excise [1973] 2 All ER 943, HL (refd)
Stemlife Berhad v Bristol-Myers Squibb (M) Sdn Bhd [2008] MLJU 354; [2008] 6 CLJ 200, HC (refd)

Legislation referred to

Personal Data Protection Act 2010 ss 8, 39
Rules of Court 2012 O 24 rr 1, 5, 7A, 7A(3), (3)(b), 8

Jonanthan Gerald (Michael Chai Ken) for the plaintiff.
Nabila Kamarudin (Christopher & Lee Ong) for the first defendant.
Sim Cheah Kuan (Zaid Ibrahim & Co) for the second defendant.
Amritpal Singh (Amritpal Singh) for the third defendant.

Mohd Firuz J:

[1] The plaintiff's application by way of originating summons (encl 1) was filed pursuant to O 24 r 7A of the Rules of Court 2012 ('the RC 2012') for the following orders:

[2] The plaintiff's application was not objected to by the second defendant subject to the information to be released being confined to only information in their possession and/or the release of the said information is within the ambit of law in particular the Personal Data Protection Act 2010. Orders to this effect were made accordingly.

[3] The first and third defendants on the other hand,objects vehemently to the plaintiff's application. Having reviewed the cause papers and upon hearing submission by both parties, on 30 May 2018, this court allowed the plaintiff's application against both the first and third defendants with no order as to costs.

[4] The third defendant has since appealed against the decision by way of a notice of appeal dated 28 June 2018. The following are my grounds in allowing the plaintiff's application.

PARTIES TO THE PROCEEDINGS

[5] The plaintiff is a franchise owner of cafe outlets under the name of 'OLD TOWN WHITE COFFEE'.

[6] The first defendant is a company dealing with activities related to payment and to up services via the internet portal industry.

[7] The second defendant is a company providing website registration services.

[8] The third defendant is the provider of the server where the website where the defamatory article was placed.

BACKGROUND TO THE SUIT

[9] Circa September 2016, the plaintiff discovered a defamatory article ('the defamatory article') relating to it circulating on websites connected to the defendants ('the offending websites").

[10] The defamatory article contained the following allegations:

(a) that the plaintiff's brand name, ownership or business was linked or associated with a 'certain hippopotamus';

(b) that the plaintiff had been bought over or was acquired by a hippopotamus; and

(c) as a consequence, the quality of the the plaintiff's food and beverages was getting worse.

[11] According to the plaintiff the contents of the defamatory article is untrue, distasteful, offensive, ill-intentioned and defamatory. The plaintiff being a public liasted company could not possibly be owned by a single entity or animal as alleged.

Summary of the plaintiff's grounds in support of the application

[12] According, to the plaintiffs, they intend to fle an action for slander of goods against sertain parties ('the intended parties') responsible for posting the defamatory article. However, the action cannot be commenced as the plaintiff does not possess the particulars of the intended parties.

[13] The plaintiff can however identify the parties that are likely to have the information that will enable the plaintiff to comence the intended action against the intended parties. It is the plaintiff's contention that the defendants does have such information much needed by the plaintiff.

[14] The plaintiff is *constrained* to file this application for pre-action discovery against the defendants:

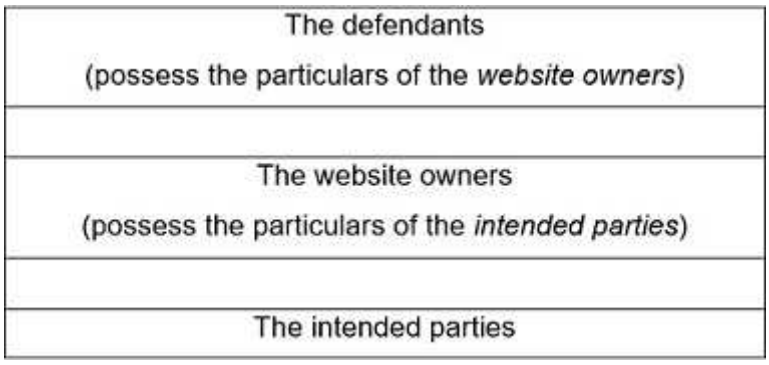
(a) the plaintiff does *not* possess the necessary particulars. The plaintiff *cannot* commence the intended action against the intended parties without the necessary particulars (see para 10 of the plaintiff's affidavit in support);

(b) the *only* parties that are likely to possess the necessary particulars are the owners of the offending websites ('website owners');

(c) however, the plaintiff *also* does not possess the information on the identities of the website owners, and so, *cannot* obtain the necessary particulars from the website owners (see para 11 of the plaintiff's affidavit);

(d) the *only* parties that are likely to possess the information on the identities of the website owners are *the defendants*. The defendants are the *administrators* of the offending websites and are therefore likely to have the information on the website owners in their possession;

(e) the plaintiff can *only* obtain the necessary particulars from the website owners *if* the defendants disclose the information on the website owners to the plaintiff (see para 13 of the plaintiff's affidavit) and the chart below):


The defendants
(possess the particulars of the website owners)
The website owners
(possess the particulars of the intended parties)
The intended parties

(f) the plaintiff seeks the aid of this honourable court *to commence* the intended action against the intended parties by granting the following orders sought:

(i) for the defendants to disclose the information on the identities of the website owners; and

(ii) for the website owners identified to disclose the necessary particulars of the intended parties (see para 16 of the plaintiff's affidavit).

[15] In short, the orders sought by the plaintiff are necessary to dispose the intended action fairly and will also save costs.

Summary of the plaintiffs' submissions

[16] In support of the above grounds the plaintiff contended that have complied with the provisions of O 24 r 7A(3) of the RC 2012 which requires an applicant seeking discovery of documenst before an action to:

(a) state the material facts pertaining to the intended proceedings;

(b) state whether the person against whom the order is is sought is likely to be a party in the subsequent proceedings in the High Court;

(c) specify or describe the documents sought and show that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made; and

(d) identify the persons against whom the order is sought is likely to have or had the documents in his possession, custody or power.

[17] Based on a search performed by the plaintiff, the plaintiff discovered D3's *name, business address* (as per the SSM search result) and the *name* of D3's *director* who later affirmed D3's reply, all under the headings of *'Registrant', 'Administrative Contact' and 'Billing Contact'*, (see the plaintiff's affidavit: exh 'LYL7'). This shows that D3 is likely to posses *both* the documents that relate to the identify of the website owners *and* the identify of the intended parties.

Summary of the third defendant's submission opposing the plaintiff's application

[18] The third defendant's objections to the plaintiff's application are as follows:

(a) the plaintiff cannot pray for discovery of information as this is contrary to the provisions of O 24 r 7A;

(b) the plaintiff has not sufficiently described and specified the documents sought to be discovered;

(c) the plaintiff has not in their affidavit shown the likelihood of the third defendant being a party or not;

(d) the plaintiff has not shown that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings; the plaintiff has not shown that the document is within the custody and control of the third defendant; and

(e) the prayers sought after by the plaintiff are too wide, vague and unclear and akin to a fishing exhibition; and the documents and/or information sought after by the plaintiff is contrary to the provisions of the Personal Data Protection Act 2010.

Summary of the plaintiff's response

[19] In response to the defendants' submsission that the plaintiff has failed to state the following:

(a) the plaintiff is only required to show that it is likely that the defendants have the documents sought by the plaintiff. The search reports exhibited in the plaintiff's affidavits reveals the names and business addresses of the defendants as the parties responsible for the administration of the offending websites where the defamatory article was posted;

(b) O 24 r 7A does allow for discovery of information; and

(c) the plaintiff has already shown that the defamatory article was posted on the offending website https://the coverage.my.

PRINCIPLES APPLICABLE IN AN APPLICATION FOR PRE-ACTION DISCOVERY

[20] To begin with, I wish to emphasise that a pre-action discovery seeks to avoid uneccesary litigation thus saving costs and preventing wastage of time and resources (parcatical and sensible approach). This provision was inserted to provide a sistematic and orderly process for the discovery of evidence leading to trial. It helps potential plaintiffs to ascertain if they are in a position to commence proceedings, by virtue of the disclosed documents the potential plaintiff will be able to decide if he has a cause of action against the defendant.

[21] In *Kuah Kok Kim & Ors v Ernst & Young (a firm)* [1997] 1 SLR 169; [1996] 3 SLR (R) 485 at para [31], the Singapore Court of Appeal explained that pre-action discovery is to assist a plaintiff who 'does not yet know whether he has a viable claim against the defendant, and the rule is there to assist him in his search for the answer'. The word 'viable' must not be understood to mean the plaintiff is entitled to pre-action discovery for the purpose of augmenting his case or 'to complete' his entire picture of the case. If that was the case, the ordinary process of general and specific discovery under O 24 rr 1 and 5 reaspectively would be subverted. Pre-action discovery serves somewhat more modest purpose: it is merely to allow the plaintiff who suspects he has a case to obtain the necessary information to allow him to commence proceedings.

[22] In *Ching Mun Fong v Standard Chartered Bank* [2012] SGHC 5; [2012] 2 SLR 22, Lai J held that a pre-action application is particularly appropriate where the applicant needs information or evidence 'to mount a claim and, and not to fish for additional evidence to ground further causes of action'.

[23] Closer to home, the principles appplicable to an application such as

filed by the plaintiff, was set out by the Court of Appeal in *Infoline Sdn Bhd (sued as trustee of Tee Keong Family Trust) v Benjamin Lim Keong Hoe* [2017] 6 MLJ 363 at p 380, held as follows:

> ... the respondent must satisfy the court that discovery of the same before filing of action against the appellant is indeed *necessary*, necessary at the *particular stage* of the application, and that is necessary because the order of discovery will allow for the *fair disposal* of the cause or matter *or* that it will lead to a *saving of costs.*

[24] What this means is that an application for an order for pre-action discovery, the plaintiff must show that the application is necessaryat this particular stage, because it will either allow for a *fair disposal* of the intended action (limb 1), *or* because it will lead to a *saving of costs* (limb 2) (see also O 24 r 8).

[25] At p 363 of the same case, Mary Lim JCA sets out *four requirements* necessary for an order for pre-action discovery to be made. The plaintiff/applicant must:

(a) state the *material facts* pertaining to the intended proceedings;

(b) state whether the person against whom the order is sought is *likely to be a party* in the subsequent proceedings in the High Court;

(c) specify or *describe the documents* sought and *show* that the documents are *relevant* to an issue arising or likely to arise out of the claim made or likely to be made; and

(d) identify the persons against whom the order is sought is *likely to have or had the documents* in his possession, custody or power.

[26] My reading of the *Infoline* case finds that, to satisfy requirement (a), it is sufficient for a plaintiff to state the intended cause of action without ascending into particulars of the same. Support for this can be found in *Kuah Kok Kim & Ors Ernst Young (A Firm)*, where it was stated (at pp 494 and 499) that:

> Although the affidavit should state the cause of action, it is *not* necessary to give particulars of it, even though it may be desirable. Indeed the rule does *not* state that particulars of the cause of action must be given. We do *not* agree with the respondents that 'material facts' under r 7A(3)(a) meant all the facts sufficient to constitute the elements of the cause of action ...
>
> ... the *object* of pre-action discovery would be *defeated* if the appellants had to show in advance that they had already got a good cause of action before they saw the documents.

[27] To satisfy requirement (b), the plaintiff need to state whether the defendant/s to the application are likely to be parties in the intended action post pre-discovery application.

[28] For purposes of requirement (c), reference is again made to the case of *Kuah Kok Kim* at p 494 on the requirement of *describing* the documents sought:

> As long as the appellants described the *type* or *class* of documents with *reasonable precision*, and that class of documents were relevant to the cause or intended cause of action, that would be *enough*. They need *not* go on to describe and name each and every such document specifically. Indeed, it would be *unreasonable* and *impossible* for the appellants to do so.

[29] Still on requirement (c), O 24 r 7A(3)(b) of the Rules of Court 2012 states that relevance can pertain to the *identity* of the *likely parties*, as is the case here:

> ... and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are *relevant* to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings or the *identity* of the *likely parties* to the proceedings, or both ...

[30] For purposes of requirement (d), the plaintiff needs to show that that the defendant/s are likely to have the documents sought. At p 570 of the *Infoline* case, Mary Lim JCA further explained that what is more important in a pre discovery application is whether the defendant to the application, has in its possession, custody or power the documents sought to be discovered (this was allowed so in the case of *Norwich Pharmacal Co and others v Commissioners of Customs and Excise* [1973] 2 All ER 943 despite the plaintiff applicant there not having a cause of action against the Customs and Excise Commissioners). When the conditions are met, and where the documents are relevant, then the documents must be produced not withstanding ten of thousands (see *Faber Merlin Malaysia Bhd v Ban Guan Sdn Bhd* [1981] 1 MLJ 105).

Note: For purposes of O 24 r 7A, 'Documents' includes infomation (see the case of *Stemlife Berhad v Bristol-Myers Squibb (M) Sdn Bhd* [2008] MLJU 354; [2008] 6 CLJ 200).

The court's analysis

[31] Having reviewed the cause papers, submissions by both parties and the principles laid down above, I am satisfied that the plaintiffs herein have fulffiled all the requirement set out under O 24 rr 7A and 8. Based on the facts laid down in the plaintiffs' affidavit in support, the plaintiffs have indeed stated the material facts pertaining to the intended proceedings which relates to a cause of action for slander of goods

[32] The plaintiffs have also identified the persons against whom the order is sought and islikely to be a party in the subsequent proceedings in the High Court apart from specifying and describing the documents needed. In this

regard, contrary to the submission of the third defendant, the plaintiff has clearly stated that the defendants herein are not the intended parties or purposes of the intended action. The plaintiff's stand on this can be seen at para 18 of their submission.

[33] The plaintiff has also shown how the documents or information as the case may be, are *relevant* to an issue arising or likely to arise out of the claim made or likely to be made. *These information relate to the the identity and addresses of the intended parties to the intended action*.The documents sought *will enable* the plaintiff *to commence* the intended action against the intended parties. In this regard the the third defendants submission that the plaintiff's application is too wide, vague and akin to a fishing expedition is misguided.

[34] As to the whether the plaintiff have identified the persons against whom the order is sought is 'likely to have or had the documents in his possession, custody or power', despite the plaintiff wrongly stating that D3 is the administrator, the search done by the plaintiff shows that D3 is as the person who registered the domain name of 'the coverage.my'. The director of the third defendant is also the contact person for the domain name. What is clear is that D3 does not deny having information on the website owners wherein the third defendant admitted that it owns a website that posts many articles but cannot remember the defamatory article and cannot find it in their records because the defamatory article was posted quite sometime ago in 2016 (*see paras 39–40 of plaintiff's submissions*).

[35] With reference to the applicability of the s 8 of the Personal Data Protection Act 2010, s 39 of the same Act does empower the courts in this country to make orders directing the person in possession of such data to disclose it to a third party.

[36] Premised on the above, I take the view that the orders sought by the plaintiff are necessary and that the intended action can *only* be fairly disposed *if* the plaintiff obtains the documents

[37] The orders sought by the plaintiff will *also* leads to saving of costs. The plaintiff will *immediately* be able to assess whether it can commence the intended action against the intended parties. This is in line with the approach set out by the Court of Appeal in *Infoline* when it stated (at p 380) that:

> The respondent must show that the discovery is necessarily required even before an action is initiated as it is *precisely to enable* the respondent *to decide* whether he can even *commence* action against the appellant in particular, to start with. And, if the information revealed from that discovery can determine or assist in reaching an answer to that predicament, then the order *ought to be made.* Such an approach is not only *fair* but *sensible* and *practical* as it can obviously avoid unnecessary

litigation thus saving costs and preventing wastage of time and resources which is what pre action discovery *seeks to achieve.*

[38] The plaintiff's application is hereby allowed with costs.

Application allowed.

Reported by Ashok Kumar